

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

*with
Personal
Service*

75-7058

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-7058

MORGAN ASSOCIATES, a Joint Venture of TERMINAL CONSTRUCTION CORPORATION, THE DIC CONCRETE CORPORATION, UNDERHILL CONSTRUCTION CORP. and NAGER ELECTRIC COMPANY, INC.,

Plaintiff-Appellant.

—v.—

UNITED STATES POSTAL SERVICE, ELMER T. KLASSEN, POSTMASTER GENERAL, JAMES J. WILSON, Assistant General Counsel, UNITED STATES POSTAL SERVICE, CONTRACTS and PROPERTY DIVISION,

Defendants-Appellees,

NAB-LORD ASSOCIATES, a Joint Venture of NAB CONSTRUCTION CORP. and LORD ELECTRIC CO., INC.,

Intervenor-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

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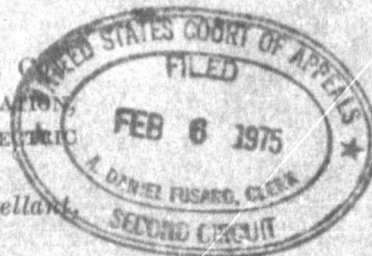


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Legislative History:

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MORGAN ASSOCIATES, a Joint Venture
of TERMINAL CONSTRUCTION CORPORATION,
THE DIC CONCRETE CORPORATION, UNDERHILL
CONSTRUCTION CORP. and NAGER ELECTRIC
COMPANY, INC.,

Plaintiff-Appellant,

- v -

UNITED STATES POSTAL SERVICE, ELMER T.
KLASSEN, POSTMASTER GENERAL, JAMES J.
WILSON, Assistant General Counsel,
UNITED STATES POSTAL SERVICE, CONTRACTS
and PROPERTY DIVISION,

Defendants-Appellees,

NAB-LORD ASSOCIATES, a Joint Venture of
NAB CONSTRUCTION CORP. and LORD ELECTRIC
CO., INC.,

Intervenor-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

Preliminary Statement

Plaintiff-appellant, Morgan Associates, a
Joint Venture of Terminal Construction Corporation,

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The Dic Concrete Corporation, Underhill Construction Corp. and Nager Electric Company, Inc. ("Morgan Associates") appeal to this Court, pursuant to 28 U.S.C. §1291, from Orders, dated January 20, 1975, denying its motion for a preliminary injunction and granting the motion of the defendant-appellees, United States Postal Service, Elmer T. Klassen and James J. Wilson ("Postal Service") to dismiss the complaint. The orders were entered by Judge Milton Pollack, Southern District of New York, on the grounds that Morgan Associates lacked standing to sue and that the Court was without subject matter jurisdiction.*

This action arises out of a bidding contest for the reconstruction of Morgan Station, a Postal Service facility in New York City. The intervenor appellee, Nab-Lord Associates, a Joint Venture of Nab Construction Corp. and Lord Electric Co., Inc. ("Nab-Lord") submitted a bid which was approximately \$3,000,000 less than the Morgan Associates' bid. Morgan Associates requested the Postal Service to disqualify the Nab-Lord bid on the grounds that Nab-Lord unfairly acquired superior information concerning the Morgan Station contract and that an award of the contract would be violative of Postal Service contracting

* See, Endorsement on Postal Service's motion to dismiss the complaint, dated January 20, 1975.

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policies and regulations. The Postal Service denied the bid protest and this action resulted. The contract has not yet been awarded; however, it is anticipated that the contract will be awarded to Nab-Lord. Morgan Associates bases federal jurisdiction on 5 U.S.C. §701 et seq., 28 U.S.C. §§1331, 1339, 1361; and 39 U.S.C. §409(a).

Issues Presented

1. Does an unsuccessful bidder for a Postal Service construction contract have standing to sue in an action for declaratory and injunctive relief to set aside a potential award of a Postal Service construction contract?
2. Does an unsuccessful bidder for a Postal Service construction contract who alleges that the spirit and intent of a permissive regulation has been violated state a claim upon which relief can be granted when that regulation has been duly waived?
3. Does an unsuccessful bidder for a Postal Service construction contract state a claim for which relief can be granted when the regulation allegedly violated was observed, and where the relief to which plaintiff was arguably entitled could not have been granted by the District Court?

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Statement of the Case

In 1967, the Post Office Department's facility at Morgan Station was gutted by a fire (R. 46)*. The Post Office Department then commenced plans to refurbish and modernize the destroyed Morgan Station facility. By an Act of August 12, 1970, Congress abolished the Post Office Department and created the Postal Service. Public Law 91-375, 84 Stat. 719. The provisions of the Act became effective at varying times but, in any event were all effective by August 12, 1971. Section 15(a), Public Law 91-375. The Postal Service continued the efforts of the Post Office Department to refurbish and modernize Morgan Station and, on or about August 26, 1974, the Postal Service, in Invitation No. R.E.B. 74-8, solicited public bids for construction work in connection with the reconstruction of Morgan Station (R. 23).** As specified in the Instruction to Bidders, the Postal Service retained complete discretion in the ultimate award of a contract:

* Numbers in parentheses preceded by the letter "R." refer to pages in the Record on Appeal.

** The invitation to bid was not made part of the record below. The Postal Service will have a copy of Invitation No. R.E.B. 74-8 available at oral argument.

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"10. Award of contract. (a) Award of contract will be made to that responsible bidder whose bid, conforming to the invitation for bids, is most advantageous to the Postal Service, price and other factors considered. (b) The Postal Service may, when in its interest, reject any or all bids or waive any informality or minor irregularity in bids received." Facilities Contracting Bulletin (Interim Regulations for the Procurement of Construction No. 74-2)(hereinafter "FCB") §18-541.3, at 18-150-51.

Three bids were submitted and on November 21, 1974, the bids were opened. Nab-Lord submitted a bid in the amount of \$51,480,000; Morgan Associates, \$54,444,000, and a third party, \$62,000,000 (R. 25). None of the bids came within the budgetary constraints of the Postal Service; however, the Postal Service Board of Governors met on February 4, 1975 and authorized the expenditure of funds sufficient to pay for the Nab-Lord bid which is approximately \$3,000,000 less than Morgan Associates' bid.* The Postal Service has agreed not to award a contract until February 17, 1975, or the decision of this Court, should it affirm the dismissal of the complaint, whichever date is earlier. The bids will expire on February 20, 1975 (R. 16).

* The Court below was advised that sufficient funds for an award of the contract could not be made available until February 4, 1975 (R. 91-92). On February 4th, funds were made available. See Affidavit of Edward M. Tamulevich, dated February 5, 1975, para. 3, which will be filed with this brief.

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Subsequent to the bid opening, Morgan Associates filed a protest against the Nab-Lord low bid (R. 57-58). Morgan Associates did not complain that the Nab-Lord bid was unresponsive or that the invitation to bid was too vague but rather claimed that Nab-Lord had the unfair advantage of superior information that was not made available to the general public and that the award of a contract to Nab-Lord would be violative of the Postal Service's regulations (R. 3).

Superior Information

The claim relating to superior information focuses on three former Postal Service employees and their relationship to a firm, Rohr-Plessey Corporation ("Rohr") which may be a subcontractor to Nab-Lord (R. 51). The three former Postal Service employees are Paul Hendrickson, who left the Postal Service in 1970 (R. 47); and Ollie E. Knight and Thomas Cargill, who both left the Postal Service in 1971 (R. 49).

Morgan Associates claims that Hendrickson, who is presently Rohr's president, acquired information relating to Morgan Station while in the Postal Service and that this information enabled Rohr to submit a lower bid to Nab-Lord for a portion of the contract (R. 12). Similar, but more expansive allegations, are made with respect to

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Knight and Cargill. The Postal Service rejected this claim and noted that "design specifications and layout drawings were not developed until almost two years after Hendrickson left the Postal Service." (R. 86) An affidavit submitted by Morgan Associates in support of its motion for a preliminary injunction actually supports the Postal Service's position on this point: "[I]n or about November of 1972 . . . the criteria of the mail system was changed." (R. 49).

Knight and Cargill, it is claimed, were employees of S.W. Brown & Associates, the firm which designed the mechanization for Morgan Station and, possibly, worked on the Postal Service drawings which were part of the invitation to bid (R. 50). Morgan Associates also claims that Knight and Cargill were employees or associates of Hendrickson and/or Rohr while they were working for S.W. Brown (R. 50-51). Morgan Associates claims that Rohr had the unfair advantage of the expertise of Hendrickson, Knight and Cargill -- an expertise which Morgan Associates claims it was denied because Rohr would not submit a bid to Morgan Associates (R. 24, 28).

The relationship between Hendrickson, Knight, Cargill and Rohr was considered by the Postal Service in response to Morgan Associates' claim that there was a

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violation of FCB 18-511. The Postal Service found that the regulation had not been violated.

The Postal Service Regulations

Morgan Associates claims that four contracting regulations were violated by the Postal Service. Three of the regulations merely set forth the general policy of the Postal Service with respect to contracting. That policy favors competitive bidding to the maximum practical extent. See Postal Contracting Manual ("PCM") §§1.301.1, 1.304.1*; FCB §18-506.**

FCB 18-511 is the focus of the appellant's claim and reads as follows:

"No bid for construction of a project shall be awarded to a firm or person that designed the project, except with the approval of the Assistant Postmaster General, Real Estate and Buildings Department or his authorized designee."
(Emphasis added)

Morgan Associates claims that Nab Lord is the "firm or person that designed" Morgan Station and, consequently, cannot be awarded the contract. The Postal Service rejected this contention since S.W. Brown and not Nab Lord designed

* The provisions of the PCM have been incorporated by reference in the Federal Register. 39 C.F.R. §601.100.

** The provisions of the FCB are not incorporated by reference in the Federal Register. See Andrews v. Knowlton, F.2d (2d Cir., Jan. 16, 1975). The purpose of the FCB regulations is "[t]o provide policies and procedures governing the procurement of construction."

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the project (R. 86). Moreover, whatever may have been the extent of the knowledge or familiarity of Hendrickson, Knight and Cargill with the design, Rohr is not a bidder on this contract.

Moreover, FCB 18-511, by its express terms, allows the appropriate official the discretion to approve a construction contract with a firm which designed the project. On February 4, 1975, when sufficient funds for award of the contract were made available, Assistant Postmaster General, Real Estate and Buildings Department, issued an advisory opinion approving the award of the contract to Nab-Lord, assuming arguendo that FCB 18-511 had been violated.*

Morgan Associates' claim that the Postal Service has deviated from its policy of competitive bidding is specious. Hendrickson, Cargill and Knight admittedly were formerly employed by the Postal Service. Morgan Associates would, in essence, require the Postal Service to disqualify these men who left its employ some four years ago from participating in a Postal Service bid. Moreover, the practical consequences of Morgan Associates' position must be emphasized. First of all, Morgan Associates does not

* See Affidavit of Alfred C. Maevis, the Assistant Postmaster General, Real Estate and Buildings Department, which will be filed contemporaneously with this brief. Mr. Maevis specifically noted the "great disparity in cost between Nab-Lord and the appellant . . ."

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dispute that FCB 18-511 was observed to the letter:

"While it is true that technically, if an award is made to NAB-LORD, a contract will not have been consummated directly with a firm or person that 'designed the project', it is equally true that through patent subterfuge, the same result, if permitted by this Court, will be obtained, thereby violating the spirit and intent of the regulation." (R. 33).

Thus, appellant asks this Court to hold that the Postal Service should have adhered not only to the clear language of its own regulation, but also to its nebulous spirit and intent. The remedy for this "patent subterfuge" would necessarily require the Postal Service, or, for that matter, any government agency, to investigate each and every employee of a bidder and any subcontractor the bidder may choose to utilize to determine (1) whether or not a former government employee works for a bidder or the bidder's subcontractor and (2) whether any employee of a bidder or its subcontractor was somehow involved in a stage of the project when the employee could have acquired information. It is respectfully submitted that the result of such an interpretation would prevent the completion of any project and ignores the commercial realities of life -- people will change jobs and use acquired skills in new positions, except where expressly prohibited by law. Such an inquiry could proceed ad infinitum.

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The District Court's Opinion

The District Court did not directly address itself to the merits of the appellant's claim. Instead, it focused on the issue of standing by reference to a closely parallel decision of this Circuit and the legislative intent of Congress in creating the Postal Service. In denying Morgan Associates' motion for a preliminary injunction and granting the Postal Service's motion to dismiss the complaint, the District Court did, however, express serious reservations about the availability of review v l non in the context of the statutory scheme creating the Postal Service.

ARGUMENT

POINT I

AN UNSUCCESSFUL BIDDER FOR A POSTAL
SERVICE CONSTRUCTION CONTRACT DOES
NOT HAVE STANDING TO SUE

The issue of the standing of an unsuccessful bidder has been squarely decided by this Court. In Edelman v. Federal Housing Administration, 382 F.2d 594 (2d Cir. 1967), an unsuccessful bidder at a Federal Housing Administration ("FHA") auction challenged the integrity of the bidding process alleging that the FHA breached a duty to give fair consideration to his bid. The operative facts in Edelman closely parallel the instant case. The unsuccessful bidder submitted a bid for the purchase of garden

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apartments. None of the bids reached the authorized minimum and all were rejected. Thereafter, the FHA privately negotiated a bid with one of the bidders. The unsuccessful bidder complained that the successful bidder was an agent of the FHA and that the negotiated bid was tainted. The successful bidder had managed the garden apartments for the FHA, 382 F.2d at 595, and the unsuccessful bidder charged that the successful bidder had the "benefit of superior information" and was "in a position to prevent others from adequately informing themselves concerning the property." 382 F.2d at 596. The allegations, likewise, in the case at bar attack the integrity of the bidding procedure on the basis of superior information made available to the successful bidder, Nab-Lord. Nab-Lord's status, however, does not rise to the level of an agent.

This Court held that the FHA, as a creature of the federal government, could only be sued pursuant to the terms of a specific federal statute. The FHA (12 U.S.C. §1702), like the Postal Service (39 U.S.C. §§401(1), 402(a)), is authorized to sue and be sued in a federal or state court. This Court found that the exclusivity provisions of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §2679, governed the action against the FHA and that the plaintiff's claim, which sounded

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in misrepresentation, deceit, or interference with contract rights, was barred by the FTCA. 28 U.S.C. §2680(h). Whether Morgan Associates' claim is likewise characterized or is viewed as merely alleging an abuse of agency discretion, Edelman mandates that the conclusion be reached that plaintiff does not state a claim under the FTCA. See 28 U.S.C. §2680(a); Blitz v. Boog, 328 F.2d 596 (2d Cir.), cert. denied, 379 U.S. 855 (1964).

In the absence of FTCA jurisdiction, this Court, relying on Perkins v. Lukens Steel Co., 310 U.S. 113 (1940), held:

"[I]t is well established that an unsuccessful bidder has no standing in a suit to challenge the legality of the bidding procedure. * * * Bidding procedures are for the benefit of the public generally and confer no private rights on the bidder. It avails appellant nothing to assert that he is not an unsuccessful bidder because Talley's bid was void; This is the issue which he is barred from litigating." 382 F.2d at 597.

Under Edelman, Morgan Associates gains nothing by asserting that Nab-Lord's bid was void because it unfairly possessed superior information. See Berry v. Housing & Home Finance Agency, 340 F.2d 939, 940 (2d Cir. 1965)(per curiam); Taft Hotel Corp. v. Housing & Home Finance Agency, 262 F.2d 307, 308 (2d Cir. 1958)(per curiam), cert. denied, 359 U.S. 967 (1959).

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Furthermore, Morgan Associates' contention that the Postal Service regulations distinguish Edelman from the case at bar is without merit. The FHA, unlike the Postal Service, was statutorily required to formally advertise any sale of property owned by it. 41 U.S.C. §§252(a)(2), (c). Accordingly, procurement regulations were involved. See 41 C.F.R. §1-1.000 et seq. The Postal Service is not statutorily required to advertise or bid for contracts. 39 U.S.C. §§401(3), 2008(c). Moreover, the Postal Service regulations in question only express policy and do not confer any benefit upon an unsuccessful bidder. Rural Electrification Administration v. Northern States Power Co., 373 F.2d 686, 693-96 (8th Cir.), cert. denied, 387 U.S. 945 (1967); Rural Electrification Administration v. Central Louisiana Electric Co., 354 F.2d 859, 865 (5th Cir.), cert. denied, 385 U.S. 815 (1966). See Alabama Power Co. v. Alabama Electric Cooperative, Inc., 394 F.2d 672, 675 (5th Cir.), cert. denied, 393 U.S. 1000 (1968). Thus, as in Edelman, the appropriate focus here is on Morgan Associates' right to a Postal Service construction contract. As in Edelman, the Postal Service expressly reserved the right to reject any and all bids.

The central issue on this appeal thus becomes whether in the seven year period following Edelman the legal rights of a disgruntled bidder have changed.

A. Standing For An Unsuccessful Bidder

The leading case which sets forth the general proposition that an unsuccessful bidder has standing to sue is Perkins v. Lukens Steel Co., supra. The issue in Perkins was whether prospective bidders for Government contracts had standing to challenge minimum wage rates which were imposed upon the bidders by the Secretary of Labor. The Supreme Court held that the potential bidders did not have standing to sue on the rationale that the procurement legislation in question conferred no enforceable right on prospective bidders and that a prospective bidder derived no enforceable rights against the Secretary of Labor for an erroneous interpretation of legislative authority. 310 U.S. at 126, 129. The Supreme Court recognized, however, that Congress could subject an agency's discretion with regard to bidders to judicial scrutiny. The Court stated:

"Courts should not, where Congress has not done so, subject purchasing agencies of Government to the delays necessarily incident to judicial scrutiny at the instance of potential sellers, which would be contrary to traditional governmental practices and would create a new concept of judicial controversies. A like restraint applied to purchasing by private business would be widely condemned as an intolerable business handicap." 310 U.S. at 130 (emphasis added).

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The Perkins standard has not been overruled.

In Hardin v. Kentucky Utilities Co., 390 U.S. 1 (1968), the Supreme Court reiterated the Perkins standard. Hardin involved a challenge to the authority of the Tennessee Valley Authority ("TVA") to compete with the respondent in certain areas. The respondent claimed that the competition was unlawful because the TVA went beyond the authority granted to it by Congress. The Supreme Court held that the respondent as a competitor had standing because the TVA legislation "reflect[ed] a legislative purpose to protect a competitive interest" and "the injured competitor has standing to require compliance with that provision." 390 U.S. at 6. Conversely, in the absence of a legislative purpose to protect a competitive interest, the disappointed competitor must base standing upon an explicit statutory provision. 390 U.S. at 7 n.7; Davis Associates, Inc. v. Secretary, Department of Housing & Urban Development, 498 F.2d 385, 388-90 (1st Cir. 1974); Rasmussen v. United States, 421 F.2d 776, 778-79 (8th Cir. 1970); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 927 n.9 (2d Cir. 1968); Alabama Power Co. v. Alabama Electric Cooperative, Inc., supra, 394 F.2d at 674-75; Choy v. Farragut Gardens, 131 F.Supp. 609, 613 (S.D.N.Y. 1955). See the discussion in National Association of Security Dealers, Inc. v. SEC, 420 F.2d 83,

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95-100 (Bazelon, C.J., concurring), 102-103 (Burger, J., concurring) (D.C. Cir. 1969), vacated sub nom. Investment Co. Institute v. Camp., 401 U.S. 617 (1971); Association of Data Processing Service Organizations, Inc. v. Camp., 406 F.2d 837, 839-43 (8th Cir. 1969), rev'd, 397 U.S. 150 (1970).

The Supreme Court sought to resolve the complexities of standing in Association of Data Processing Service Organization, Inc. v. Camp., 397 U.S. 150 (1970). In Camp, the petitioners challenged the ruling of the Comptroller of the Currency which allowed national banks to enter their sphere of economic activity. The Supreme Court reiterated the test set forth in Hardin and set forth a two-fold test for the determination of standing. First of all, it must be determined "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 397 U.S. at 153. Secondly, it must be determined whether Congress has resolved "the question one way or another." 397 U.S. at 154. In resolving this issue, the Supreme Court set forth the following guideline:

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"There is no presumption against judicial review and in favor of administrative absolutism..., unless that purpose is fairly discernible in the statutory scheme."
397 U.S. at 157 (emphasis added).

The statutory schemes which the Supreme Court referred to in Camp are (1) the legislation regulating the conduct in question (Hardin) and (2) the Administrative Procedure Act, 5 U.S.C. §701 et seq. (Camp). An analysis of the Postal Reorganization Act and its relation to the Administrative Procedure Act makes it clear that the holding in Edelman that denied standing to a disgruntled bidder remains unscathed insofar as the Postal Service is concerned. See Barlow v. Collins, 397 U.S. 159, 165-66 (1970). As is evident from a plain reading of the statutes and from legislative history, Morgan Associates is not arguably within the zone of interests sought to be protected by the Postal Reorganization Act and the Administrative Procedure Act is not applicable to the Postal Service.

B. The Postal Reorganization Act and the Administrative Procedure Act

On August 12, 1970, Congress enacted the Postal Reorganization Act, 39 U.S.C. §101 et seq., which abolished the old Post Office Department and established the United States Postal Service "as an independent establishment of the executive branch of the Government of the

United States." 39 U.S.C. §201. Control over the Postal Service was removed from the President and Congress and transferred to an eleven member Board of Governors. 39 U.S.C. §202.

Congress clearly intended that the Postal Service be run as a non-Governmental independent business. As Senator Gale W. McGee, the co-sponsor of the Postal Reorganization Act and the Chairman of the Senate Committee on Post Office and Civil Service, stated:

"Delivering the mail is simply not in the same category of policy-making and program-development as foreign policy, national defense, housing, highway construction, or health and education assistance to State and local governments. It is an essential, business-oriented service."

* * *

"Except as specified in the bill, all laws relating to public works, contracts, employment, appropriations budgeting and any other laws governing agency operations are made inapplicable to the Post Office." 116 Cong. Rec. 21709, 91st Cong., 2d Sess. (Emphasis added.)

Consonant with its business nature, the Postal Service has the power "to make such expenditures and to enter into such contracts, agreements, and arrangements, upon such terms and conditions and in such manner as it deems necessary..." 39 U.S.C. §2008(c). See 39 U.S.C. §401(3).

Congress has specifically excluded the application of most federal laws relating to agencies to the Postal Service:

"(a) Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service." 39 U.S.C. §410(a).

Congress' intent with respect to 39 U.S.C. §410 is clear. Laws applicable to Government agencies are not applicable to the Postal Service unless specified otherwise in Title 39. In this regard, Senate Report No. 91-912, 91st Cong., 2d Sess.*; states:

"The committee in no way deprecates the system of checks and balances established in the law over the years to insure that public policy as determined by Congress shall be followed by the Postmaster General. But it has found that, by the process of accumulation, the laws controlling the governance of the Department have become excessively restrictive and it is not too soon for a complete break with the past.

* * *

"The Board of Governors shall have broad authority and shall not, except as specified, be subject to Federal laws dealing with contracts, property, the civil service system, the Budget and Accounting Act of 1921, apportionment of funds, and other laws which in most instances apply to Government agencies and functions." Report at 2,5 (Emphasis added.)

*Senate Report No. 91-912 relates to Senate Bill S.3842 whose language was substituted for other language in H. R.17070. 116 Cong. Rec. 22345 (1970). H.R. 17070 was enacted as the "Postal Reorganization Act". See House Report No. 91-1104, 91st Cong., 2d Sess.

Section 410(a) states that chapters 5 and 7 of title 5 of the United States Code are not applicable to the Postal Service unless provided otherwise in 39 U.S.C. §410(b) or the remainder of title 39. Chapters 5 and 7 of title 5 have incorporated the provisions of the Administrative Procedure Act. There is no provision anywhere in title 39 which indicates any concern about bidders or provides that the Administrative Procedure Act applies to disappointed bidders.*

Congress made it clear that "no Federal law dealing with public or Federal contracts" is applicable to the Postal Service. Thus, for example, the provisions of Title 41 (Public Contracts) are inapplicable. Furthermore, Congress made it clear that the Administrative Procedure Act would be applicable to the Postal Service in certain limited circumstances which are not relevant here.

* The Act, however, is specifically made applicable to cases involving mailability, 39 U.S.C. §3001(f), with the exception of pandering advertisements, 39 U.S.C. §3008(h); and to decisions of the Governors with respect to rates for postage, 39 U.S.C. §3628. See, e.g., N. Van Dyne Advertising Agency, Inc. v. United States Postal Service, 371 F. Supp. 1373 (S.D.N.Y. 1974); American Image Corp. v. United States Postal Service, 370 F. Supp. 964 (S.D.N.Y. 1974), aff'd, ___ F.2d ___ (2d Cir., Oct. 19, 1974); Baslee Products Corp. v. United States Postal Service, 356 F. Supp. 841 (D.N.J. 1973); Institute for Weight Control, Inc. v. Klassen, 348 F. Supp. 1304 (D.N.J. 1972), aff'd rem., 474 F.2d 1338 (3d Cir. 1973); Pent-R-Books, Inc. v. United States Postal Service, 328 F. Supp. 297 (E.D.N.Y. 1971).

In light of the presumption stated in Camp, Congress made it clear that the Administrative Procedure Act was not applicable to this contract situation.

The regulations relied upon by Morgan Associates do not confer any rights upon a disappointed bidder. Three of the regulations merely set forth a Postal Service policy of competitive bidding to the extent practicable. See PCM §§1.301.1, 1.304.1; FCB §18-506. The fourth regulation, FCB §18-511, merely sets forth a policy that the Postal Service will contract with the design firm only if a designated official approves the contract. No private right may be inferred from the regulations. Any other construction would defy logic. See Rural Electrification Administration v. Northern States Power Co., supra, 373 F.2d at 696.

Consequently, Morgan Associates does not have an interest that is arguably within the zone of interests to be protected by the Postal Reorganization Act. The Congressional intent is to have the Postal Service operate without judicial review in situations of this type. As noted in the District Court, judicial review is inappropriate and would frustrate the Congressional purpose of establishing the Postal Service to modernize the postal system expeditiously (R. 12).

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C. The Edelman Case Precludes
Standing

The Postal Reorganization Act in no way expresses any legislative intent to protect bidders for Postal Service contracts. Thus, unlike the competitor in Hardin, Morgan Associates must ground its standing on a specific statutory grant. In the absence of a statutory grant, to fetter the Postal Service with judicial review of its awards of public contracts would be, as the Supreme Court noted in Perkins, "an intolerable business handicap." 310 U.S. at 130. Thus Edelman is dispositive of the issue of standing presented here. See Cincinnati Electronics Corp. v. Kleppe, _____ F. 2d _____ (6th Cir., Jan. 31, 1975) (Nos. 73-2046, 74-1170)*; Davis Associates, Inc. v. Secretary, Department of Housing and Urban Development, supra; United States v. Gray Lines Water Tours, 311 F.2d 779, 782 (4th Cir. 1962); Walter P. Villere Co. v. Blinn, 156 F.2d 914 (5th Cir. 1946) (per curiam); Garv Aircraft Corp. v. United States, 342 F.Supp. 473 (W.D. Tex. 1970); Pullman Inc. v. Volpe, 337 F. Supp. 432 (E.D. Pa. 1971).

* In Cincinnati Electronics, the Sixth Circuit held that absent "a congressionally created exception, the general rule of Perkins v. Lukens Steel, supra, that a disappointed bidder has no legally enforceable right against the government's award of a procurement contract retains its validity." Slip op. at 11. The Court found that the unsuccessful bidder came within the "zone of interests" to be protected by the act in question. Slip op. at 10. The opposite is true in the case at bar.

D. The Cases Cited by Appellant Are Inapposite

Morgan Associates essentially relies on two lines of cases in support of its position: Court of Claims decisions and cases following Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970). The Court of Claims decisions merely hold that a disappointed bidder may sue in the Court of Claims' for bid preparation costs. Jurisdiction was based on the Tucker Act, 28 U.S.C. §1491, and not on the Postal Reorganization Act. Moreover, Morgan Associates has not made a claim for bid preparation costs. Assuming arguendo that there is a cause of action which would enable Morgan Associates to recover bid preparation costs, if that claim were in excess of \$10,000, the Court of Claims would have exclusive jurisdiction. 28 U.S.C. §1346(a)(2).

The Scanwell line of cases is inapposite. In Scanwell, the Administrative Procedure Act was found to be the "aggrieved party" statute. 424 F.2d at 865. Moreover, the Court expressly recognized that Congressional intent would preclude review. 424 F.2d at 866. Furthermore, Scanwell has been interpreted as basing standing upon the Administrative Procedure Act. See Wilke, Inc. v. Department of Army, 485 F.2d 180, 183 (4th Cir. 1973); M. Steinthal & Co. v. Seamans, 455 F.2d 1289, 1291 (D.C. Cir. 1971); Gary Aircraft Corp. v. United States, supra, 342 F.Supp. at 476-77. Compare City Chemical Corp. v. Shreffler,

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333 F. Supp. 46 (S.D.N.Y. 1971), where the Court approved the Scanwell decision, however, the agencies involved there were, unlike the Postal Service, subject to the Administrative Procedure Act.

POINT II

AN UNSUCCESSFUL BIDDER FOR A POSTAL SERVICE CONSTRUCTION CONTRACT WHO ALLEGES THAT THE SPIRIT AND INTENT OF A PERMISSIVE REGULATION HAVE BEEN VIOLATED DOES NOT STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED WHEN THAT REGULATION HAS BEEN DULY WAIVED.

The claim of Morgan Associates when distilled to its essence relates solely to FCB 18-511. Appellant, indeed, concedes that it makes no claim that the Postal Service "has done anything at variance with any Federal law..." Appellant's Brief, at 20. FCB 18-511 expresses the Postal Service's policy of not contracting with the firm or person who designed the project open to bid. The regulation is, however, permissive and expressly provides that an award of a contract may be made to the designer "with the approval of the Assistant Postmaster General... or his authorized designee." Although the Postal Service does not view approval as necessary in this case, approval was nonetheless secured in the form of an advisory opinion which assumed arguendo that FCB 18-511 was violated.*

* After considering Morgan Associates' allegations, Assistant Postmaster General Maevis authorized the award of the contract to "Nab-Lord under the circumstances present in this case due to the great disparity in cost between Nab-Lord and the appellant, approximately three million dollars (\$3,000,000)." Maevis Affidavit, at para. 3.

The language of FCB 18-511 clearly shows that the regulation was not intended to create any right in favor of a bidder. It is merely a policy that may be waived by the appropriate officials. Had Morgan Associates demonstrated standing to sue, the Court possibly could have compelled the Postal Service to exercise its discretion with respect to FCB 18-511, see Safir v. Gibson, 417 F.2d 972, 978 (2d Cir. 1969), cert. denied, 400 U.S. 850 (1970), but it could not have compelled a particular decision within the scope of the Postal Service's discretion. Assuming arguendo that Morgan Associates has standing, the waiver of FCB 18-511 cannot be set aside unless it is established that the decision has gone "far beyond any rational exercise of discretion." United States ex rel. Schonbrun v. Commanding Officer, 403 F.2d 371, 374 (2d Cir. 1968) cert. denied, 394 U.S. 929 (1969). See Leonhard v. Mitchell, 473 F.2d 709 (2d Cir.), cert. denied, 412 U.S. 949 (1973).

The waiver of FCB 18-511 is clearly within the agency's discretion. Morgan Associates has not made and cannot make the argument that Congressional intent is otherwise. As in Schonbrun, Morgan Associates does not deny that the Postal Service has acted "'within its jurisdiction under valid law.'" 403 F. 2d at 374. Moreover, Congress has explicitly excluded the Administrative Procedure Act from application to the Postal Service's contracting

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activities and has expressed the intent of expeditious modernization of the Postal Service* and, to that effect, clearly intended that the Postal Service operate as a commercial business. Consequently, assuming arguendo that Morgan Associates has standing, the waiver of FCB 18-511 may be reviewed only to the extent of deciding whether the waiver "has gone so far beyond any rational exercise of discretion as to call for mandamus...."

403 F.2d at 374. See Davis Associates, Inc. v. Secretary, Department of Housing and Urban Development, supra, 498 F.2d at 388; Rasmussen v. United States, supra, 421 F.2d at 779-80.

It is significant that the Court of Appeals for the District of Columbia has followed this position in a Scanwell context. In Wheelabrator Corp v. Chafee, 455 F.2d 1306 (D.C. Cir. 1971), the plaintiff complained that the Navy failed to follow its procurement regulations. The Court construed the regulations in question as permissive, stating:

"They are permissive, authorizing a possibility of negotiation, not requiring it in this situation. Where government officials act within the limits of the discretion conferred upon them by Congress, there is no arbitrary and capricious action which the courts have power to enjoin."
455 F.2d at 1309.

* See the District Court opinion at R. 9-10.

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In the Postal Reorganization Act, Congress clearly permitted the Postal Service to choose its own method of securing goods or services. 39 U.S.C. §§401(3), 2008(c). The Postal Service chose in this instance to solicit competitive bids. Nab-Lord's bid was approximately \$3,000,000 lower than Morgan Associates' bid. The Assistant Postmaster General accordingly waived FCB 18-511. As stated in Wheelabrator:

"[W]here the Court is generally without jurisdiction of a challenge to official action there is a limited exception if the pleading papers established on their face, without any burrowing into the administrative file, that the agency action violates a clear command of the governing law, and that no state of facts may reasonably be conceived that would justify the administrative action."
455 F.2d at 1312.

No such clear showing has been made here. Indeed, Morgan Associates recognized this by requesting expedited discovery below (R. 37).

POINT III

AN UNSUCCESSFUL BIDDER FOR A POSTAL SERVICE CONTRACT DOES NOT STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED WHEN THE REGULATION ALLEGEDLY VIOLATED WAS OBSERVED AND WHEN THE RELIEF TO WHICH THE PLAINTIFF IS ARGUABLY ENTITLED COULD NOT HAVE BEEN GRANTED BY THE DISTRICT COURT

Morgan Associates claims that FCB 18-511 would be violated by an award of the Morgan Station contract to Nab-Lord. Appellant does not seek monetary damages, but rather seeks declaratory relief awarding the contract to

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itself, and injunctive relief preventing the award to Nab-Lord. It is clear that FCB 18-511 was not violated and that the plaintiff's remedy, if any, is in the Court of Claims for bid preparation costs.*

A. FCB 18-511 Was Observed By The Postal Service

FCB 18-511 provides:

"No contract for construction of a project shall be awarded to a firm or a person that designed the project, except with the approval of the Assistant Postmaster General, Real Estate and Buildings Department or his authorized designee." (Emphasis added.)

The record is devoid of any evidence that FCB 18-511 would be violated if, as anticipated, Nab-Lord is awarded the contract. Nab-Lord was not the "firm" or "person" that designed the project. The mechanization was designed by S.W. Brown (R. 50). The contract will not be awarded to Rohr which is, at best, a subcontractor to Nab-Lord (R.51). In any event, Rohr did not design the project. Indeed, Morgan Associates concedes that FCB 18-511 was not literally violated. (R. 33). Even if FCB 18-511 were ambiguous and required judicial interpretation, the Postal Service's denial of Morgan Associates' bid protest was not an abuse of discretion. As the Supreme Court noted in Udall v. Tallman, 380 U.S. 1 (1970):

* Presumptively, the plaintiff spent more than \$10,000 in preparing the bid. See 28 U.S.C. §§1346(a)(2), 1491.

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"When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. *** When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.

'Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt.... [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.' Bowles v. Seminole Rock Co., 325 U.S. 410, 413-414. " 380 U.S. at 16-17.

Here, the Postal Service applied the plain meaning of its own regulation. Clearly, this is not a case of a "plainly erroneous" interpretation. Therefore, Morgan Associates' has failed to state a claim for which relief can be granted.

B. The Relief Requested Could Not Have Been Granted By The District Court

Morgan Associates asked for declaratory and injunctive relief. The District Court could not have awarded the contract to Morgan Associates because the award of a contract has been committed to the discretion of the Postal Service. Moreover, it is apparent that a plaintiff who has an adequate remedy at law is not entitled to injunctive relief. If there is a legal remedy, Morgan Associates should pursue it. Since it is reasonable to

assume that more than \$10,000 has been expended by Morgan Associates in formulating its bid, see Davis Associates, Inc. v. Secretary, Department of Housing and Urban Development, supra, 498 F.2d at 389, Morgan Associates should proceed in the Court of Claims which recognizes a cause of action for bid preparation costs. See Excavation Construction, Inc. v. United States, 494 F.2d 1289, 1290 (Ct. Cl. 1974) (per curiam).^{*} As the Court of Appeals for the District Columbia recognized in M. Steinthal & Co. v. Seamans, supra, 455 F.2d at 1302:

"The judicial discretion to decline to entertain actions seeking declaratory or injunctive relief, on the grounds of equitable considerations or of concerns of the 'public interest,' may also be involved. The availability of a damages remedy in the Court of Claims, which in many cases will compensate the frustrated bidder's realized financial losses (i.e., the bid preparation costs) resulting from the illegal agency action, provides a sound equitable basis for the exercise of this discretion in considering whether to entertain a suit for injunctive relief."

The public interest here, as the District Court noted, is "[expeditious] modernization of the Postal Service..." (R. 12). The modernization of Morgan Station would necessarily be delayed by a remand to the District Court

*As noted in Excavation Construction, the burden of proof is justifiably high: "[T]he aggrieved bidder 'must show that there was no reasonable basis for the decision' ..." 494 F.2d at 1290.

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followed by extensive discovery and a trial. (R. 18-20.)*
The Postal Service must award this contract by February 17th. If it cannot do so, there is no guarantee that the Postal Service will be able to secure a bid as advantageous as Nab-Lord's.

Consequently, the appellant should be confined to the Court of Claims to pursue whatever legal remedy it may have there.

Conclusion

For all of the reasons hereinabove set forth, the orders of the District Court, denying preliminary relief and dismissing the complaint, should be affirmed.

Respectfully submitted,

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-Of Counsel-

* See also appellant's affidavit in support of its motion for preference, in which it is stated that the District Court recognized that there would be lengthy discovery and a trial before an injunction could issue. Affidavit of Allen Ross, dated January 22, 1975, at 5.

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